

2001

## Descent

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### Recommended Citation

Aviam Soifer, *Descent*, 29 Fla. St. U. L. Rev. (2014) .  
<http://ir.law.fsu.edu/lr/vol29/iss1/5>

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# FLORIDA STATE UNIVERSITY LAW REVIEW



DESCENT

*Aviam Soifer*

VOLUME 29

FALL 2001

NUMBER 1

## DESCENT

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Dalia Tsuk's article substantially enriches our understanding of the multiple forms and complexities of pluralism.<sup>1</sup> She achieves this admirably through her focus on Felix Solomon Cohen and the Indian New Deal. Her cogent elaboration of Cohen's changing notions underscores how entangled ideas about pluralism remain today. Succinctly placing Cohen's evolving ideas within the context of his own times and his personal life, Tsuk wisely reminds us of how scholars of the first half of the last century both anticipated and could not resolve the most basic issues within the continuing debate about pluralism.<sup>2</sup>

Indeed, one might find it hopeful that the tension between particularism and universalism apparently is and is likely to remain ultimately unresolvable in the modern world.<sup>3</sup> The dangers and frustrations of living within this very tension may help to explain—though not to excuse—Cohen's willingness to bend or fracture history to fit another purpose. Cohen's 1946 article, *How We Bought the United States*,<sup>4</sup> for example, may have been intended as a useful means towards what Cohen perceived as the compelling end of increasing popular tolerance for minorities.<sup>5</sup> Such whitewashing of the past also provides a sad epigraph to Cohen's personal transformation; however, as Tsuk suggests, *How We Bought the United States* cuts against Cohen's own significant and largely enlightened place in the troubled history of white-Native American relations.<sup>6</sup> In fact, Cohen's abuse of history for what he apparently viewed as admirable, tolerance-enhancing pragmatic goals underscores the importance of Cohen's own rhetorical question—"And who of us is not a member of

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\* B.A., 1969; M. Urban Studies, 1972; J.D., 1972, Yale University. Many thanks to the FSU staff for their noteworthy patience and assistance with this Essay. Readers who are interested in this author's more detailed analysis of some of the core constitutional issues might wish to consult Aviam Soifer, *A Very Troubling Supreme Court Precedent: Race, Hawaii and History*, at <http://www.tompaine.com/history/2000/04/20/1.html>.

1. Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189 (2001).

2. *Id.* at 201-02.

3. *See id.* at 264-66. Tsuk explains that she uses "pluralism" as a noun to refer to a commitment to devising a plural polity." *Id.* at 190 n.1.

4. Felix S. Cohen, *How We Bought the United States*, COLLIER'S, Jan. 19, 1946, at 22, reprinted with adaptation in Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947), and reprinted in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 273, 279-88 (Lucy Kramer Cohen ed., 1960).

5. *Id.*

6. *See* Tsuk, *supra* note 1, at 254-63.

some minority?"<sup>7</sup> Yet that insight also suggests the ongoing, damnable difficulty inherent in determining what we should do about the myriad of minority statuses and pluralisms in which we actually live our lives.

One of the most significant contributions Tsuk makes is her clear-eyed description of Cohen's upbringing and its hothouse New York City context.<sup>8</sup> The importance of this personal biography for Cohen's role and his changing ideas suggests the first of two key meanings of descent: one's immediate family. A second implicates a broader meaning of descent—the sense of being born into a group or groups. Being a Jewish American growing up in the first decades of the twentieth century was deeply important to Cohen, though at first he seems to have sought to escape this particular identity through socialist universalism.<sup>9</sup> Felix initially followed his father, Morris Raphael Cohen, a famous philosopher and teacher at City College of New York during that school's heyday as a crucible for high-achieving sons of immigrants.<sup>10</sup> But Felix's later movement from personal suppression of group identity to what Tsuk describes as "comparative pluralism" seems a significant form of rebellion against his father's denigration of group identity, even perhaps an attempt by Felix to identify more directly with his historic lineage.<sup>11</sup> The complex intersection of biographical, sociological, and anthropological senses of descent, exemplified in the expansive context of Felix Cohen's words and deeds, also suggests fundamental, unsettled contemporary issues concerning the appropriate heft of race, tribe, and ancestry.

Felix Cohen's major contribution to American law was anchored directly in his gradual awakening to the fact that American Indian tribes possessed unique cultures and many varieties of sovereignty.<sup>12</sup> Professor Tsuk does a fine job of tracing his learning curve, and its impact on the federal legal arrangements concerning Native Americans that Cohen helped to engineer. Moreover, the federal policy of termination that quickly followed Cohen's tenure in Washington provides tragic twentieth-century evidence that the trajectory of governmental policy towards Native Americans hardly has been consis-

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7. *Id.* at 267 (quoting Felix S. Cohen, *Indian Self-Government*, 5 AM. INDIAN 3 (1949), reprinted in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN, *supra* note 4, at 305 [hereinafter Cohen, *Indian Self-Government*]).

8. Tsuk, *supra* note 1, at 209-16. Tsuk's book-length manuscript, *Encounters with Pluralism: The Life of Felix S. Cohen*, provides a wonderfully rich elaboration of Cohen as a skeptic, realist, and activist. See Dalia Tsuk, *Encounters with Pluralism: The Life and Thought of Felix S. Cohen* (unpublished manuscript, on file with author).

9. Tsuk, *supra* note 1, at 211-15.

10. *Id.* at 215-16.

11. See *id.* at 253-55. For a brief discussion of Morris Raphael Cohen's disparaging account of what he called "communal ghosts," see AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 72-80 (1995).

12. See Tsuk, *supra* note 1, at 226-27.

tently upwards and onwards.<sup>13</sup> (To be sure, anyone who considers the history of white-Native American relations seriously cannot be surprised that promises broken, blood shed, and hard-earned lessons quickly and completely forgotten became a key component of public policy during and after the Warren Court era.) The Supreme Court's direct role in this very sad history has been extensively discussed elsewhere.<sup>14</sup> However, awareness of that history underscores the importance of a tragic sense of history quite different from that which prevails within the American mainstream. We ought not to ignore the many stories of declension that both surround us and directly underlie the very ground upon which we delight to stand.

An important additional sense of descent implicates decline. This connotation maps a tale of shared mortality as well. In the American scheme, however, declension is only a faint counterpoint to the broadly triumphalist teleological faith that dominates our beliefs. Yet this idea of decline—of descending rather than ascending a staircase, a mountain, or the trajectory of a full life—also entails a familiar theme: our failure to live up to the grand ideals of the basic origin stories of those groups from which we are descended. These origin tales, these mythical and yet foundational accounts of the past, demand careful attention.<sup>15</sup>

In this respect, sadly, Cohen failed. Specifically, although Cohen was generally a brilliant critical thinker with a wonderfully coruscating sense of realism, his account of the history of Indian relations with white settlers willingly ignored the facts so far as they were known. More generally, even the changing, pragmatic sense of pluralism that Cohen so greatly exemplified never adequately attended to the crucial role of the past in establishing group identities. Brief consideration of two current, interconnected aspects of descent underscores the importance of a crucially sobering element within Dalia Tsuk's cogent description and discussion of pluralism.

#### I. ANCESTRY, RACE, AND DESCENT

It is deeply ironic that Native Hawaiians, in the course of defending the state of Hawai'i's meager deference to their historic traditions and group identity, had to rely on analogies to the plight and the le-

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13. See *id.* at 263-65.

14. See, e.g., Symposium, *Native American Law*, 28 GA. L. REV. 299 (1994) (including a collection and discussion of sources).

15. For an introduction to these issues that is both learned and wise, see MILNER S. BALL, CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW (2000), and, for the context of the suppression of Native American claims within the American constitutional law canon, see Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989), and Milner S. Ball, *Constitution, Court, Indian Tribes*, AM. B. FOUND. RES. J. 1 (1987).

gal treatment of members of Native American tribes.<sup>16</sup> Never tribal, Native Hawaiians found little respect and virtually no understanding for their unique culture when a case involving their identity reached the United States Supreme Court. To defend themselves, Native Hawaiians were forced back to the kind of pluralism identified with Felix Cohen's innovations regarding Native Americans a half century earlier. Even this analogy did not succeed, however, as the United States Supreme Court, last year in *Rice v. Cayetano*,<sup>17</sup> invoked the Fifteenth Amendment<sup>18</sup> to invalidate a provision of the Hawai'i Constitution designed to benefit Native Hawaiians.<sup>19</sup>

In the process of striking down the Hawaiian voting scheme, the Supreme Court simply proclaimed, "Ancestry can be a proxy for race."<sup>20</sup> The Court thereby cast a great shadow of serious constitutional doubt over a broad array of established programs and pending legal claims that seek to help and to recognize the legitimate historic claims of Native Hawaiians.<sup>21</sup> The specific provision at issue in *Rice* restricted the vote for trustees of the state's Office of Hawaiian Affairs (OHA) to "Hawaiians," defined as descendants of the peoples who inhabited Hawai'i when Captain Cook first made contact in 1778, and to "native Hawaiians," defined as descendants of such peoples in at least half their bloodline.<sup>22</sup> The first definition mirrored traditional Hawaiian practice, while the second reflected the introduction of the use of blood quantum by the federal government in the 1920s.<sup>23</sup>

Justice Kennedy's majority opinion proclaimed that the State of Hawai'i, through its ballot restriction, unconstitutionally "used ancestry as a racial definition and for a racial purpose."<sup>24</sup> Moreover,

16. See *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000).

17. *Id.*

18. U.S. CONST. amend. XV, § 1 (providing that U.S. citizens' right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude").

19. *Rice*, 528 U.S. at 524.

20. *Id.* at 514.

21. A formal introduction to the legitimacy of such claims is available within Senate Joint Resolution 19 of the 103rd Congress, which was approved on November 23, 1993, to "acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawai'i, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawai'i." S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993). An immediate ramification of the *Rice* decision was a blunderbuss constitutional attack on all government-financed Native Hawaiian programs, in *Barrett v. Hawai'i*, currently pending in Federal District Court in Hawai'i before District Judge David Ezra.

22. *Rice*, 528 U.S. at 499.

23. See *id.* at 500-01, 507.

24. *Id.* at 515. Justice Kennedy wrote for a five-vote majority; Justice Breyer wrote a concurring opinion, in which Justice Souter joined; and Justices Stevens and Ginsburg each filed dissents. For an excellent analysis of the Court's techniques, and particularly its appallingly sloppy but revealing approach to history, see Chris K. Iijima, *Race Over Rice*:

Kennedy asserted, "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."<sup>25</sup> Indeed, he continued, "[a]n inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens."<sup>26</sup> But is ancestry really like race, and do either or both concepts differ significantly from the oft-celebrated concepts of lineage and genealogy?

It is impossible to believe that the Court's remarkable, sweeping attack on any inquiry into ancestry actually means what it says. If it did, for example, the method by which states administer passing intestate property ownership would apparently be unconstitutional.<sup>27</sup> But the Court's decision and, even more, its rhetoric reveal an astonishing leap of faith by the Justices. They posit a world in which individual merit always prevails and nobody's past really matters at all. The Constitution secures respect for the "unique personality" of each and every American. The past is past, and in no way can the past be prologue,<sup>28</sup> because winners in the contemporary race of life prevail entirely on account of their merits as individuals and their essential personal qualities. According to the Court, in fact, the Constitution actually forbids consideration of the burdens and benefits that aided either any individual or any group of individuals through descent.<sup>29</sup> This is taking "all men are created equal" far more literally than ever has previously been the case.<sup>30</sup> It is an entirely deracinated brave new world!<sup>31</sup>

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*Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 RUTGERS L. REV. 91 (2000).

25. *Rice*, 528 at 517.

26. *Id.*

27. Presumably, Kennedy's screed against the use of ancestry is limited to inquiries by the state. Under *Shelley v. Kraemer*, 334 U.S. 1 (1948), there apparently would be sufficient state action through the judicial administration of probate directly to pose the constitutional dilemma created by the *Rice* Court's extremism in pursuit of individualism. But under remnants of the 1866 Civil Rights Act, currently codified at 42 U.S.C. §§ 1981 and 1982, even private use of ancestry might be considered an invalid proxy for race. For an intriguing discussion of the longstanding use of private property to manipulate issues of group identity, see Carol Weisbrod, *A Comment on Property and Divorce*, 32 CONN. L. REV. 291 (1999).

28. See WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1, line 248 (Stephen Orgel ed., Oxford Univ. Press 2d ed. 1987) (stating: "What's past is prologue.").

29. *Rice*, 528 U.S. at 517.

30. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

31. "O brave new world" is also from Shakespeare's *The Tempest*. SHAKESPEARE, *supra* note 28, act 5, sc. 1, l. 184. Also in *The Tempest* is Prospero's denigration of his innocent daughter Miranda for her lack of knowledge about her lineage and her past: "Art ignorant of what thou art; nought knowing/Of whence I am." SHAKESPEARE, *supra*, at act 1, sc. 2, l. 18-19. I discussed some possible thematic and historical connections between that

Furthermore, the Court's treatment of Hawaiians is hardly an isolated instance. Just when many scholars and other Americans have come to believe that race may be a social construct that defies scientific classification,<sup>32</sup> the Court majority has hardened both its heart and its reliance on a purportedly hard-wired categorization of race in the process of invalidating affirmative consideration of race.<sup>33</sup> Yet both the "ancestry" and the "race" sides of the *Rice* proxy vote are deeply problematic.

The Court's assumption that enough equality has been achieved in Hawai'i tragically hearkens back to the Court's major role in aggressively legitimating Jim Crow. Now, as then, the Court is insistent that any special care is unconstitutionally paternalistic. Once again, as the Court said to Black laborers who were forced from their jobs by an Arkansas mob in 1906, the Justices think it crucial that no one be treated as "wards of the Nation."<sup>34</sup> Rather, said the Court, the very grant of citizenship both enacts and requires that the nation assume of all citizens, whether they are voluntary or not, that "in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes."<sup>35</sup>

One need not invoke John Maynard Keynes's famous attack on faith in the long run<sup>36</sup> in order to recognize the bitter irony in the repetition nearly a century later of the 1906 Court's faith in remand-

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play and early colonial American history in *Law and the Company We Keep*. Soifer, *supra* note 11, at 7-30.

32. See generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (asserting that races are not biologically differentiated groupings, but rather social constructions); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990) (asserting that because law is preoccupied with boundaries, it has failed to resolve the meaning of equality for people society views as different); ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE, CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999) (asserting that demographic change in America necessitates a change in thinking about both race relations and racial justice); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747 (1994) (arguing that biological definitions of race have no sound basis); Robert Westley, *First-Time Encounters: "Passing" Revisited and Demystification As a Critical Practice*, 18 YALE L. & POLY REV. 297 (2000) (discussing "passing" as the boundary which unlocks the door to racial identity).

33. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

34. *Hodges v. United States*, 203 U.S. 1, 20 (1906). Writing for a seven-two majority, Justice Brewer invalidated the federal convictions of members of the mob because, in the Court's view, the Thirteenth Amendment could not support federal power broad enough to vindicate the rights of black laborers. *Id.* at 18-20. This decision, and many others like it that similarly condemned as unconstitutional whatever the Court perceived to be paternalism, are discussed in Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 L. & HIST. REV. 249 (1987).

35. *Hodges*, 203 U.S. at 20.

36. "In the long run, we are all dead." JOHN MAYNARD KEYNES, *A TRACT ON MONETARY REFORM* 80 (1923).



ing minority concerns to the tender mercies of the states.<sup>37</sup> At a time when the Supreme Court appears to believe that honoring states' rights and protecting state treasuries was a major concern of the victorious armies and the 39th Congress in the wake of the Civil War, the tendency to invoke false history for some perceived greater good probably should not surprise us. It should still appall us, however. If it does not, then that ennui in itself marks a significant decline, as critical thinking should be combined with, and not in opposition to, moral commitment.

## II. DESCENT AS TRAGIC DECLINE

The information explosion, particularly as undergirded by the Internet, seems to put an extraordinary premium on the velocity and volume with which ideas are disseminated.<sup>38</sup> In the name of maintaining standards, we increasingly seem to rely on standardized measures and timed tests. Nuance and complexity, context and relationships have begun to appear too soft and too complicated for our times. In the name of sophisticated, civilized modernity, moreover, we can imagine destroying a village to save it, or refusing to count votes in order to assure that the fundamental interest of citizens in having their votes counted is constitutionally protected.<sup>39</sup>

The *Rice* Court's dystopian vision of a nation in which each individual stands entirely alone, without a past that might matter in any way, resonates much more with *Invasion of the Body Snatchers* than it does with the profound promises within the "great outlines" of the innovative United States Constitution.<sup>40</sup> If we ignore the past, however, we cannot depart from it. If we think we have transcended our roots, we will never be able to escape their stranglehold.

It is indeed tragic that Native Hawaiians, a sovereign nation whose people neither sought nor ever accepted American citizenship, were left to argue before the United States Supreme Court that the closest constitutional analogy to their plight was to be found in the situation of Native Americans.<sup>41</sup> It is profoundly ironic that the Court's response in *Rice v. Cayetano* even rejected that comparison.<sup>42</sup> Instead, the Court proclaimed a vigorous version of enforceable, tri-

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37. See *Hodges*, 203 U.S. at 20.

38. See Clifford Geertz, *Life Among the Anthros*, N.Y. REV. OF BOOKS, Feb. 8, 2001, at 18.

39. See *Bush v. Gore*, 531 U.S. 98 (2000).

40. *INVASION OF THE BODY SNATCHERS* (Republic Pictures 1956). John Marshall described the Constitution as a document of "great outlines" rather than as a "prolix legal code" in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). For a compelling analysis of the Constitution's affirmative promises, see generally CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED* (1997).

41. See *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000).

42. *Id.*

umphant consensus history as it mentioned the past only in passing. This is how Justice Kennedy concluded his opinion for the Court:

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.<sup>43</sup>

That said, screaming eagles and all, there still may be comfort in the knowledge that neither Felix Cohen nor even the Supreme Court can manipulate history definitively. As the historian William Wiecek put it, “oppressed peoples have an acute sense of their past. . . . [T]hey must: it is the crucible of their identity and their cohesion. Without it their present oppression becomes either meaningless or natural.”<sup>44</sup> Our general understanding of the plight of the oppressed may ebb and flow. Yet their history will not simply disappear amidst clouds of wishful thinking.

Felix Cohen provided a vivid extended metaphor when he likened Indian tribes to the miners’ canary—a bird whose very fragility allowed it to serve as an early warning system for hardier human beings.<sup>45</sup> If a solitary caged bird deep in a mine actually were to survive long enough to die of “natural causes,” however, that miners’ canary most likely would leave no descendants.<sup>46</sup>

Through Dalia Tsuk’s illuminating work, we can find both sobering lessons and some hope in Felix Cohen’s own gradual awakening to the relative great weight of separate pluralisms. Respectfully or not, it is left to us to dissent vigorously from the Court’s insistent evisceration of ongoing, vital lines of descent.

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43. *Id.* at 524.

44. William Wiecek, *Preface to the Historical Race Relations Symposium*, 17 RUTGERS L.J. 407, 412 (1986).

45. See Cohen, *Indian Self-Government*, *supra* note 7, at 313-14.

46. See *id.*